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No. 90-1685

Supreme Court, U.S.
FILED
JUN 5 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

HENRY HARPER, *et al.*,

Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

REPRINTED COPY

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QUESTIONS PRESENTED

The questions presented in this case turn on how this Court decides another case that has been argued and on which decision is pending:

1. If the decision in *James Beam Distilling Co. v. Georgia,* No. 89-680, is that tax invalidating decisions of this Court may be applied prospectively only by following the analysis outlined in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), the question presented is whether the Supreme Court of Virginia properly applied that analysis to the particular facts and circumstances of this case.

2. If the decision in *James Beam Distilling Co. v. Georgia,* No. 89-680, is that tax invalidating decisions of this Court must always be applied retrospectively, the question presented by this case is whether the decision of the Supreme Court of Virginia that the state remedy sought is unavailable for reasons based entirely on state law is fully adequate to support the judgment below.

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STATEMENT OF THE CASE

The question in this case is whether the Commonwealth of Virginia is obligated under state or federal law to provide a potential tax refund now exceeding $440 million. Petitioners are retired federal employees who receive federal pension benefits and retirees from military service who receive military retired pay. There are over 192,000 such federal and military retirees in Virginia, more than in any other state. In May 1989, Petitioners filed suits in state court against the Virginia Department of Taxation (hereafter "Commonwealth"), seeking refunds for state income taxes paid for taxable years 1985, 1986, 1987 and 1988. Petitioners claimed entitlement to refunds under Va. Code Ann. § 58.1-1826 (Supp. 1990), which provides that "[i]f the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order [refunds]." Petitioners alleged that this Court's March 28, 1989 decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) ("*Davis*"), applied retroactively to state income taxes imposed on their federal pension income prior to that decision, and that the taxes therefore were "erroneously and improperly assessed" under state law.

The circuit court and, on appeal, the Supreme Court of Virginia, disagreed with both contentions. In an opinion published at 241 Va. 232, 401 S.E.2d 868 (1991), the Virginia Supreme Court held that, as a matter of state law, Petitioners had no entitlement to relief under the refund statute because "state law does not require tax refunds, but to the contrary, grants prospective only application to decisions that invalidate a state taxing scheme. . . . " Petition for Certiorari, App. B at 12a. As to the federal

question, the Court applied the analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) ("*Chevron*"), to conclude that the *Davis* decision would be applied prospectively only in any event.

There is no issue in this case of sufficient importance or generality to warrant the grant of certiorari. Contrary to Petitioners' assertions, this is not a case like *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990) ("*McKesson*"), where a blatantly unconstitutional state tax levy was inconsistent with settled law at the time it was enacted and imposed. Here, the Commonwealth's good faith clearly is undisputed in the record below. The state tax policy at issue in this case was originally established in 1942 (Ch. 325, 1942 Va. Acts 481, 500 (Reg. Sess.)), was never challenged or protested by any taxpayer for nearly 50 years until this Court's decision in *Davis*, and was promptly repealed by the legislature in a Special Session called after *Davis* was decided. The record in this case also clearly establishes that a $440 million refund liability would impose extreme hardship on the people and government of Virginia by forcing either a tax increase or the reduction of essential state services and impeding legislative budget planning.

The analysis of potential issues in a case such as the one presented by the Petition for Certiorari advances in three successive steps.

First, there is the question whether Petitioners have an assertable federal right. This question turns at the outset on whether the decision of this Court in *Davis*

applies retroactively to taxes assessed by the Commonwealth of Virginia before the effective date of that decision. The relevance of this question to a grant of the writ of certiorari, as well as questions derivative from it, is addressed in Part I below.

Second, if Petitioners have an assertable federal right, there is the question whether state law authorizes the remedy they have sought in this action. Since this suit was filed under the Virginia state refund statute, it is a question of state law, to be determined in the first instance by the Virginia Supreme Court, whether an action lies under this remedial state legislation. The relevance of this question to a grant of the writ of certiorari is addressed in Part II below.

Third, if state law does not authorize the particular remedy asserted by these Petitioners, the only question which may be remaining for the Petitioners is whether some other remedy is now available to them and, if not, whether the Commonwealth has denied the Petitioners due process in the remedial structure it has provided for the collection of taxes that violated federal law when collected. The relevance of this question to a grant of the writ of certiorari is addressed in Part III below.

REASONS FOR DENYING THE WRIT

I. The Asserted Federal Right

It is common ground that the Virginia tax imposed on the civil service Petitioners prior to the *Davis* decision could not now be imposed upon them because of that

decision. The Virginia General Assembly promptly repealed that tax and replaced it with an approach to the taxation of retirement benefits that is not challenged in this suit and that, all parties agree, is fully in compliance with the *Davis* mandate.

Thus, the first issue is whether, as a matter of federal law, *Davis* applies retroactively to taxable events occurring before the effective date of that decision. If it does not, Petitioners have no federal right to assert, and this litigation is terminated. The Supreme Court of Virginia held that it does not, and, accordingly, rendered the judgment from which this petition for a writ of certiorari has been filed.

Whether this aspect of the judgment of the Virginia Supreme Court is correct turns, first, on whether it is *ever* permissible to apply to a decision such as *Davis* the criteria first developed in *Chevron* and both elaborated upon and applied in this context by the plurality in *American Trucking Associations, Inc. v. Smith,* 110 S. Ct. 2323 (1990) (*"ATA"*). If it *is* permissible, the question then is whether the Virginia Supreme Court was correct in its application of that analysis to the facts of this particular case.

This first issue – whether it is *ever* permissible to apply the *Chevron* analysis to a decision of this Court invalidating a state tax – is already before the Court in a case on which argument has been heard and decision is pending. If the decision in *James B. Beam Distilling Co. v. State,* 259 Ga. 363, 382 S.E.2d 95 (1989), *cert. granted,* 110 S.

Ct. 2616 (1990) (No. 89-680, argued Oct. 30, 1990) ("*Beam*"), is that it is permissible to apply a constitutional decision of this Court invalidating a state tax only to taxable events occurring after the date of decision, this writ of certiorari should be denied. There is no other issue in the case of sufficient importance or generality to warrant the grant of certiorari. And, there is no reason to grant certiorari in this case to determine a question already before the Court in an argued and pending case.

If this Court decides in *Beam* that a *Chevron* analysis is appropriate in this class of cases, the only remaining federal question properly raised by this petition is whether the Supreme Court of Virginia correctly applied that analysis to the facts and circumstances of this case. This question does not warrant a grant of certiorari both because the decision below was plainly correct and because the question is in any event of insufficient significance and generality to justify review by this Court.

A. Application of *Chevron*

Part I of the decision below by the Supreme Court of Virginia is an unremarkable and plainly correct application of the *Chevron* analysis to this case. Petitioners' question-begging assertion that there was nothing "new" in this Court's decision in *Davis* is belied by the fact that thousands of taxpayers had paid this tax in Virginia from its enactment in 1942 until the *Davis* litigation (as had taxpayers over approximately the same period of time in 22 other states) without any suggestion that there might be a constitutional problem or any other legal difficulty with its imposition. It defies common sense to believe, as

Petitioners assert, that "not a single new principle of law was established in *Davis*." Petition for Certiorari at 13. If this is so, why did thousands of taxpayers in 23 states, some of whom – no doubt – were tax experts or attorneys, and many of whom – no doubt – sought expert help in the preparation of their tax returns, continue to pay the tax for 50 years without a whimper of protest? One can search the litigated cases, applicable administrative proceedings, and the relevant literature in vain for any warning or prediction that what is now argued by Petitioners to be so plain was understood by either the tax-imposing or the tax-paying communities in 23 states before the *Davis* litigation.

As the Virginia Supreme Court held, there is nothing in the facts or background of this case to suggest "that the Commonwealth acted other than in good faith reliance upon a presumptively valid taxing statute." Petition for Certiorari, App. B at 5a. The ultimate question in this case, then, is who should bear the costs for not having foreseen the invalidating decision in *Davis*.

A decision by this Court that *Chevron* permits the prospective-only application of *Davis* would be a decision that the costs should be allocated on the basis of equitable considerations. As the Commonwealth argued below and as the Virginia Supreme Court held, there can be no doubt about where the equities lie in this case. The citizens of Virginia should not be required to suffer an additional $440 million tax increase or reduction in such essential state services as education, police protection, social services, and corrections so that a group of taxpayers who slept on their rights for 50 years can enjoy an

unexpected and undeserved financial windfall. The windfall is unexpected because *Davis* was a surprise to these taxpayers as well as to the government that imposed the tax. It is undeserved both because of the nature of the harm to Petitioners and the very real harm that will be caused to the other citizens of Virginia by remedying it in the manner Petitioners seek. These taxpayers were not harmed as the result of the deprivation of a personal constitutional right, such as freedom of speech or the freedom from unreasonable search or arrest. They were "harmed" because the Commonwealth of Virginia and 22 other states innocently failed to interpret correctly an abstract principle of intergovernmental tax immunity designed to order the relationship between federal and state *governments*, not the relation between state government and its citizens. That "harm" is adequately remedied by the prospective invalidation of the tax already accomplished by the *Davis* litigation.[1] The true harm in this case will be suffered by the innocent citizens of Virginia if they are required, in these recessionary times, to pay $440 million in additional taxes or to forego $440 million in state services.

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[1] It is important, indeed, to put the "harm" alleged by petitioners in perspective. Not all constitutional "harms" are remedied by compensatory relief. For example, in the school litigation inaugurated by *Brown v. Board of Education*, 347 U.S. 483 (1954), there was no retrospective compensatory relief and indeed prospective relief was in many cases substantially delayed. The same was true in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (decision declaring Bankruptcy Act of 1978 unconstitutional applied prospectively only). In the present context, no one is contending that relief should be fully retroactive past the point where, in

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It could be argued, as Petitioners do, that the best way to remedy Virginia's innocent misinterpretation is to give these Petitioners and other similarly situated taxpayers refunds and to spread the cost of those refunds through the entire taxpaying community. It is quite another thing, however, to take a realistic look at where the money will come from. It will have to come either from increased taxes or from decreased state services. In either case, there will be proportionally less of either

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effect, state statutes of limitation preclude a refund remedy. There thus will not be "full" retroactive compensatory relief under any view of the present litigation. Once it is recognized, moreover, that *some* state interests (statutes of limitation, for example) can serve to cut off an asserted right to compensatory relief, one is tempted to ask why the repose interest of a statute of limitations should be distinguished from the repose interests recognized by the *Chevron* analysis. Purely prospective relief in the present context, in other words, does not deprive the Petitioners in this case of *all* relief for the underlying constitutional violation, and the extent to which they are entitled to more will in any event – assuming the recognition of statutes of limitation – represent a compromise between the state's interest in settled expectations and the compensatory arguments of the claimants.

There is in any event – as the Commonwealth argued in its amicus brief in *Beam* – a substantial argument, whether looked at through the lens of retroactivity analysis or through the lens of remedial doctrine, that the relief to be granted for the kinds of harm recognized in a case like *Davis* should reflect equitable considerations that take into account the relative positions of the parties. This, at bottom, is all the Commonwealth seeks in this litigation.

existing resources or any necessary tax increase to provide much needed State support for state-financed programs. This means proportionally less money for the state's public school system, from kindergarten to graduate education in its publicly supported universities. It means less money for law enforcement. It means less money for social services. It means less money, to one degree or another, for a wide variety of state services. And it puts an unwarranted burden on the more than 2.5 million innocent taxpayers in the Commonwealth. At the margins, those who will suffer the most will be those who are most in need of the kinds of assistance government provides to its citizenry. If equitable considerations are to govern the outcome of this case, there is precious little to be said for the kind of income redistribution sought by the Petitioners in this litigation.[2]

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[2] Moreover, what petitioners ask is out of all proportion to the burden placed upon them. The economic cost they incurred is a small one when measured by the amount of tax they paid and the taxes they would have paid in the absence of the exemption for state and local retirees. Of four categories of income (federal pensions, private pensions, state and local pensions, and all other individual income), Virginia exempted only one – the modest retirement benefits of only some 66,000 state and local retirees in a state with some 2.56 million individual income tax returns. Had Virginia received tax revenues from state and local pensions, it could have met its tax revenue needs by imposing marginally lower taxes on all taxpaying citizens. Every taxpayer thus would have benefited. Implicit in Petitioners' refund demand is that only *they* should benefit and that the other citizens of the Commonwealth should bear the entire burden on their behalf.

B. Petitioners' Efforts to Distinguish *Chevron*

Petitioners make two arguments to the effect that, even if generally applicable to decisions by this Court that invalidate state taxes, *Chevron* nonetheless cannot apply here. The first is that *Davis* was a *statutory* decision and that the *Chevron* analysis applies only to *constitutional* decisions. This argument ignores the plain language of *Davis* itself: "[T]he dispositive question in this case is whether the tax imposed on appellant is barred by the doctrine of intergovernmental tax immunity." 489 U.S. at 814. The rationale of *Davis* was that it did not matter whether 4 U.S.C. § 111 "provide[d] an independent basis for finding immunity or merely preserve[d] the traditional constitutional prohibition against discriminatory taxes." *Id.* at 813. "In either case," this Court continued, "the scope of the immunity" claimed by the appellants "is to be determined by reference to the constitutional doctrine." *Id.* at 814. Petitioners also ignore the prospective-only application of this Court's Title VII statutory interpretation decisions. *See, e.g., Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1095, 1105-07 (1983) (Powell, J., concurring) (the imposition of massive retroactive monetary liability against the state would be inappropriate, although the state was found to have violated Title VII).

Petitioners' second argument appears to be that this case is different because there is an available remedy under state law for the refunds sought here. This argument conveniently ignores the fact that the Virginia

Supreme Court, which is the authoritative source in this context on questions of state law, explicitly held to the contrary in Part II of the opinion below.

It is plain that neither of these arguments independently or together justifies the grant of certiorari in this case. Neither raises the kinds of "special and important reasons" that warrant this Court's review. *See* U.S. Sup. Ct. R. 10.1.

C. Military Retirees

Petitioners also devote two pages of their argument to the question whether there is a relevant difference in the application of *Davis* to civil service retirees on the one hand and retirees of the Armed Forces on the other. Why they believe this is a ground on which this Court should grant certiorari is not clear. They admit, as is the case, that "[t]he court below did not reach this argument. . . ." Petition for Certiorari at 19. They do not acknowledge, as is also the case, that they did not raise in the Virginia Supreme Court the argument they make now. It is true, as they assert, that *the Commonwealth* argued to the Virginia Supreme Court that such a distinction ought to be drawn in the event that *Davis* was to be applied retroactively. It is surely novel to assert that this Court should grant certiorari to reject an argument made by the prevailing party below, which was not raised below by the Petitioners, which was neither adverted to nor passed upon by the court below, which was in no sense necessary to

the decision reached below, and which was in fact made irrelevant by the basis for the decision below.[3]

D. Appropriate Disposition

On the assumption that *Beam* holds that the *Chevron* factors are applicable to this class of cases, Petitioners' argument that certiorari should be granted comes down to the proposition that this Court should hear the case because the Virginia Supreme Court misapplied the *Chevron* factors to its particular facts and circumstances.

There are three reasons why this argument is unavailing. First, it is wrong. The application of the *Chevron* factors to this case exactly tracks application of the same factors to the analogous situation by the plurality in *ATA*. Second, Petitioners' argument misconceives the criteria used by this Court in determining when to exercise its certiorari power. Even if the application of *Chevron* to the facts of this case were arguable, the issues presented are not of sufficient generality or importance so as to justify plenary consideration by this Court. And third, as the analysis in Part II will demonstrate, there is in any event an adequate and independent state ground of

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[3] In addition, Petitioners misstate Virginia law in this portion of their petition. Virginia is not, as they assert, a "source tax" state. Unlike some other states, Virginia does not impose a "source" tax on nonresidents who have retirement income from previous employment in the State. Individuals who change their domicile to another state and maintain a place of abode in Virginia for less than 183 days during the taxable year are not taxed by Virginia on any retirement income received while a nonresident.

decision in the present case that, under accepted principles long followed by this Court, forecloses a grant of the writ.

It therefore follows that, if *Beam* holds the *Chevron* analysis appropriate to determine the retroactivity of this Court's state-tax-invalidation decisions, certiorari should be denied in the present case.

II. The State Remedy

The arguments made above are premised on the assumption that the outcome in *Beam* will be that it is permissible to apply constitutional decisions of this Court invalidating a state tax only to taxable events occurring after the date of decision. Should this not be the *Beam* result, a wholly different line of analysis would apply to this case.

The first issue to be determined in that event would be whether the remedy sought by these Petitioners is available to them under state law.

The Virginia Supreme Court held that the remedy sought by these Petitioners was *not* available to them under state law. It did so in two passages in its opinion. The first occurs at the end of Part II:

> Harper's state-law contention also fails for another reason. We previously have held that this Court's ruling declaring a taxing scheme unconstitutional is to be applied prospectively only. . . . We adhere to our holding. . . .

Petition for Certiorari, App. B at 10a-11a.

The second occurs in the Court's summary in the last paragraph of its opinion:

> In sum, we hold that . . . state law does not require tax refunds, but to the contrary, grants prospective-only application to decisions that invalidate a taxing scheme. . . .

Id. at 12a.

These statements are in response to the Commonwealth's argument below, that, even if *Davis* is to be applied retroactively, state law provides no remedy to these Petitioners. The Virginia Supreme Court held that the state law refund remedy is limited to refunds based on previously established law, and is not available based on "new" decisions establishing "new" taxpayer rights irrespective of whether they find their source in state or federal law. Decisions announcing and applying this limit on the state refund remedy were part of the Virginia legal landscape long before *Davis* was decided. *See Perkins v. Albermarle County*, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing*, 214 Va. 416, 200 S.E.2d 566 (1973), and *Capehart v. City of Chesapeake*, No. 5459, Cir. Ct. City of Chesapeake, *petition for appeal denied*, 215 Va. xlvii, *cert. denied*, 423 U.S. 875 (1975).[4] Virginia taxpayers during the time frame relevant to this litigation were therefore on notice that, once a tax was paid, refunds were not available under state law on legal grounds not clearly established by prior law.

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[4] This denial of the petition for appeal by the Virginia Supreme Court was a decision on the merits. *Sutherland v. Swannanoa Corp.*, 189 Va. 149, 154, 52 S.E.2d 92, 95 (1949).

As recognized by both the plurality and the dissent in *ATA*, the scope of the state refund remedy is a question of state law. *ATA*, 110 S.Ct. at 2330; and 110 S.Ct. at 2346 (Stevens, Brennan, Marshall, Blackmun, JJ., dissenting). The Virginia Supreme Court held that these Petitioners did not meet, purely as a matter of state law, the Virginia standards for the state refund remedy. Accordingly, the proper disposition of this petition is to deny certiorari. Under long-settled principles, it is not the practice of this Court to disturb dispositive determinations of state law for which there is a reasonable basis in prior state decisions, particularly in a case where the Petition for Certiorari makes no argument that the state ground for decision is inappropriate or invalid. Moreover, whatever the outcome may be on the issues mooted in *Beam*, the judgment below in this case rests on an adequate and independent state ground, neither the adequacy nor the independence of which has been challenged in the Petition for Certiorari. As a general matter, this Court will not grant certiorari to consider federal questions that will make no difference to the outcome of the case. *Michigan v. Long*, 463 U.S. 1032 (1983). There is no reason to do so here.

If there be any doubt about the meaning of the Virginia Supreme Court decision, moreover, this Court is not the place to clear things up. The proper disposition in that event would, at most, be a remand in light of *Beam* to enable the Virginia Supreme Court to make its state law premises clear. But the Petitioners have not sought this relief; and the Virginia Supreme Court decision is clear and forecloses any necessity for such a disposition.

It is plain that the Virginia Supreme Court, not this Court, is the forum in which to determine whether the remedy sought by these Petitioners is available to them. Thus, there is no case for a grant of the writ of certiorari at this stage of the proceedings in order for this Court to consider issues related to the scope of the state remedy.

III. Potential Due Process Issues

If the result in *Beam* is that *Davis* must be applied retroactively to the tax years in litigation in this case, and if the particular remedy chosen by these Petitioners is not available to them under state law, other questions might, in an appropriate case, arise. They would include other questions of state law such as whether there is some other remedy presently available and whether pre-payment remedies would have been available if sought. The Commonwealth argued below that Petitioners could have pursued other pre-payment remedies and that their failure to do so should preclude them from relief in this refund suit. Depending on the resolution of these questions, it may be that, under the analysis of *McKesson* and the *ATA* dissent, further federal due process issues would arise.

But this is not the stage of this litigation where such questions should be entertained by this Court. In the first place, the Petition for Certiorari makes no due process arguments. Secondly, no such questions were passed upon by the Virginia Supreme Court. Such questions can be addressed when they are properly presented in a case in which they have been properly litigated and decided in the lower courts. But it is clear that now is not that

time and this is not that case. Certiorari should not be granted by this Court to consider such speculative questions now.

IV. Even If *Beam* Is Decided on Other Grounds, Certiorari Should Be Denied

Parts I and II, above, state the Commonwealth's position on the assumption that this Court's decision in *Beam* resolves the merits of the application of the *Chevron*-retroactivity analysis to cases of the type now before the Court. If *Beam* does not resolve that question, it may be thought that the present case would be an appropriate vehicle for the resolution of that important issue.

The analysis in Part II above, however, reveals that it would not. There is in this case an adequate and independent state ground of decision that predetermines the outcome of this case no matter how *Beam* ultimately is resolved. For the Court to grant certiorari in this case, therefore, would be for it to render the kind of advisory opinion from which it wisely has refrained in the past.

CONCLUSION

In the end, there is only one federal question presented by this Petition for Certiorari that is of sufficient importance as a general matter to warrant a grant of the writ. That question – whether the *Chevron* analysis may be applied to determine the application of a state-tax-invalidating decision to taxable events occurring before the decision – has already been argued and presented to

the Court for decision in *Beam*. As the foregoing analysis demonstrates, no matter how this issue is resolved, certiorari should be denied in this case.

Presumably *Beam* will resolve the merits of the issue. If the resolution is in favor of application of the *Chevron* analysis, the petition should be denied. The remaining questions decided by the Virginia Supreme Court were correctly determined on that premise, and in any event are not of sufficient generality and importance to warrant a grant of the writ. If, on the other hand, the resolution in *Beam* is that such an analysis is always inappropriate, certiorari still should be denied because of the adequate and independent ground of decision below that the state remedy sought by the Petitioners is unavailable to them. They have raised no argument premised on federal law, here or before the Virginia Supreme Court, that would invalidate that ground of decision. And even if *Beam* does not resolve the merits of the application of the *Chevron* analysis, this case would not be an appropriate vehicle for doing so because of the presence of this adequate and independent state ground of decision.

For the foregoing reasons, therefore, the Petition for a Writ of Certiorari to the Supreme Court of Virginia should be denied.

Respectfully submitted,

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